

## Expert Analysis

### The Future of TMDLS And Flow Post-*VDOT v. EPA*

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The U.S. Environmental Protection Agency appears to have abandoned its efforts to regulate stormwater flow in setting a total maximum daily load for impaired waters under the Clean Water Act.

On Jan. 3 the EPA faced a significant loss in the U.S. District Court for the Eastern District of Virginia regarding the use of stormwater flow rate as a surrogate pollutant in a "total maximum daily load," or TMDL.<sup>1</sup> The court found for the plaintiff on its motion for judgment on the pleadings that, as a matter of law, stormwater is not a pollutant as defined by the CWA, and therefore the EPA cannot regulate stormwater flow in lieu of regulating the pollutant sediment discharges in a TMDL. The EPA failed to take appeal on the ruling, and the decision stands as law in Virginia, leaving the regulated community wondering what new direction the EPA intends to take to address stormwater-related pollution.

#### BACKGROUND

The Virginia Department of Transportation case involved the setting of a TMDL for the Accotink Creek, a 25-mile tributary of the Potomac River in Fairfax County, Va. The EPA was required to set TMDLs to improve the health of the benthic community. As a result of prior litigation, the creek was identified as having benthic impairments. The EPA believed a reduction in sedimentation would improve the benthic health. As a result, it established a TMDL for Accotink Creek limiting the stormwater flow rate to 681.8 ft<sup>3</sup>/acre-day.

The Virginia Department of Transportation and the Fairfax County Board of Supervisors (collectively, VDOT) challenged the EPA's TMDL on the basis that the CWA does not authorize the EPA to set a TDML based on stormwater flow as a surrogate to sedimentation, but only to regulate pollutants in stormwater, among other grounds.

At the hearing on VDOT's motion for judgment on the pleadings, both parties agreed that "sediment is a pollutant and stormwater is not."<sup>2</sup> The sole issue before the court was: Does the CWA authorize the EPA to regulate the level of a pollutant in Accotink Creek by establishing a TMDL for the flow of a nonpollutant into the creek?



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In this regard, the court reviewed the EPA's decision to set the TMDL using the two-step analysis under the *Chevron* framework.<sup>3</sup>

Applying the first step, the court determined if any statutory ambiguity exists by analyzing 33 U.S.C. § 1313(d)(1)(C), which provides the authority for establishing TMDLs for pollutants identified by the administrator. In so doing, the court examined whether Congress expressly authorized the EPA to set a TMDL for a nonpollutant, such as stormwater. The court held that this statute is not ambiguous, reasoning that the "EPA is charged with establishing TMDLs for the appropriate pollutants," which does not "give them authority to regulate nonpollutants."<sup>4</sup>

In coming to this conclusion, the court explained the District of Columbia U.S. Circuit Court of Appeals rejected a similar attempt by the EPA "to take liberties with the way Congress intended it to express its TMDLs" in *Friends of the Earth Inc. v. EPA*, 446 F.3d 140, 143 (D.C. Cir. 2006) (holding the EPA is not allowed to express a TMDL for the Anacostia River in terms of annual or seasonal maximums because the CWA granted the EPA authority for only daily loads). In rejecting the EPA's argument that the stormwater TMDL is a surrogate, the court stated the "EPA may not regulate something over which it has no statutorily granted power — annual loads or nonpollutants — as a proxy for something over which it is granted power — daily loads or pollutants."<sup>5</sup> Based on the court's finding, a surrogate pollutant must still be a "pollutant" under the CWA.

Although the court stated that the second step of the *Chevron* analysis was unnecessary, it found the "EPA's attempt to set TMDLs for nonpollutants" to be "an impermissible construction of the statute."<sup>6</sup>

The court's reasoning in the VDOT decision should not have come as a surprise to the EPA. It had used similar logic to take no action on a proposed TMDL in the Yellowstone Basin. In December 2000, EPA Region 8 issued a response to Montana's Department of Environmental Quality regarding a TMDL of Big Creek in the Yellowstone Basin, stating it interpreted the definition of "pollutant" in the CWA as excluding flow alterations such as those impairing Big Creek. Since the CWA required the EPA to approve or disapprove those TMDLs established under Section 303(d)(1)(C), and since flow alterations were not a pollutant, the EPA did not take action on that submission; rather it indicated the flow management plan for Big Creek appeared to be a reasonable approach and commended the state on its good work on the Big Creek plan.<sup>7</sup>

#### **LITIGATION ON THE ISSUE OF FLOW IN OTHER STATES**

The VDOT holding, although not binding outside Virginia, certainly had a chilling effect on other flow-based TMDL litigation across the nation. As the VDOT court alluded to in its decision, the EPA had been challenged in other jurisdictions for its use of flow. In Missouri, EPA Region 7 developed three other TMDLs for flow that were all challenged in court. One of these cases involved Columbia, Missouri. It challenged the EPA by way of a complaint filed June 13, 2011, in the U.S. District Court for the Western District of Missouri with regard to the TMDL for Hinkson Creek that sought to require a 39.6 percent reduction in flow from the city's municipal separate storm-sewer systems, called MS4s. "Flow" was used as a surrogate parameter for the "unknown" pollutants causing biological impairments the TMDL sought to address. The EPA ultimately agreed to drop the flow-based surrogate from the TMDL in settlement of that suit.

The city of Springfield, Mo., also challenged the EPA on Sept. 30, 2011, when it filed a complaint in the same district. In that case, the EPA sought to establish a TMDL that also used “flow” as a surrogate parameter for “unknown” pollutants causing biological impairments. The TMDL would require a 30 percent to 40 percent reduction in flow from the city’s MS4. After the VDOT decision, the EPA filed a motion asking the court to vacate the agency actions challenged as it represented to the court it would like to reconsider the challenged TMDLs.

Historically, TMDLs have been a source of litigation. However, it is worthy to note that VDOT, the city of Columbia and the city of Springfield likely filed suit against the EPA not because they were against progressive stormwater management, but because they knew they would not be able to meet the target reduction within the financial and technical constraints. In this regard, as states and the EPA continue to create TMDLs for impaired waters that remain on the Section 303(d) list, financial and technological constraints of the regulated community will remain an issue stakeholders cannot ignore or treat lightly because litigation will ensue.

Moreover, communities around the country with TMDLs in place using surrogates will likely begin a discussion regarding the future of those TMDLs. Should the regulated community determine it is unable to meet the requirements placed upon it by these TMDLs, it is likely a VDOT challenge will be raised. While those communities not struggling with compliance based on surrogate TMDLs likely won’t raise a legal challenge.

Specifically, the Potash Brook in Chittenden County, Vt., uses stormwater runoff volume as a surrogate. This TMDL was submitted to the EPA in October 2006. There does not appear to be any specific reference to Vermont law that would support the use of this surrogate. While VDOT is not binding law in Vermont, similar arguments could be raised to challenge legality of the use of this surrogate as approved by the EPA.

Likewise in Maine, the Barbery Creek TMDL uses impervious surface as a surrogate, which the EPA approved in 2006. In 2007 the Eagleville Brook TMDL in Mansfield, Conn., also incorporated the use of impervious surface as a surrogate. Similar to Potash Brook, neither of these TMDLs makes a specific reference to a state law that would provide a legal basis for use of a nonpollutant surrogate.

#### STATES FREE TO USE FLOW UNDER STATE LAW

The VDOT ruling does not affect states like Delaware that have chosen to regulate stormwater as a pollutant. Delaware has specific sediment and stormwater regulations written into its Administrative Code.<sup>8</sup> States may create their own rules, regulations or laws limiting flows. In this regard, a state may develop TMDLs under state laws that limit flow, as the validity of such restrictions would be determined under state law.

Similarly, the state of Washington included state-promulgated flow provisions in a 1994 Section 401 water quality certification, which started the dialog questioning the CWA’s scope with respect to flows.<sup>9</sup> The EPA then promulgated regulations aimed at MS4s stating that MS4 operators, which are mostly local governments, “must” use an ordinance or other regulatory mechanism to address stormwater flow “to the extent allowable under state, tribal, or local law.” 40 C.F.R. § 122.34. As a result of this regulation, flow limits and prescriptions have been included as a requirement

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in CWA permits. These flow limits and prescriptions have been the subject of CWA permit appeals and citizen suit enforcement. We can reasonably anticipate some may seek to invalidate questionable flow limits as a piggy back to the VDOT ruling. However, unless a plaintiff is able to demonstrate that the state adopted an identical definition of pollutant as defined in 33 U.S.C. § 1362(6) that does not include flow rate or otherwise adopted the definition by reference, an argument based on VDOT could be seen as mere bootstrapping similar to the EPA's ineffective argument that the agency had discretion to set the TMDL as it saw fit.

### **FUTURE OF FLOW REGULATION**

The lack of an EPA appeal is not surprising when one evaluates the viability of success on appeal in contrast to the risk of making bad law, since the VDOT decision is limited to the state of Virginia and the TMDL program. The VDOT decision does not impact the EPA's ability to regulate flow under the National Pollutant Discharge Elimination System program, which many believe is where the EPA will now refocus its efforts.

Unlike the TMDL program, which starts by addressing impacts to the water quality of receiving streams and then works upstream to determine the allocated loads allowed to avoid these impacts, the NPDES MS4 program is iterative. It uses more flexible goals to address impacts of stormwater runoff which includes intergovernmental coordination, land use policies, and land development activities.

Flow-based regulation in the NPDES program appears to be protected by Section 402(P)6 of the CWA, which states that stormwater discharges are "to be regulated to protect water quality." Section 402 specifically grants the EPA the authority to issue permits for discharges of municipal stormwater, provided such permits include "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and such other provisions as the administrator or the state determines appropriate for the control of such pollutants." Arguably, the downstream impacts of uncontrolled stormwater could be addressed by limiting the generations of runoff volume through a retention standard under this rule. However, some take the position that the NPDES program was established to reduce point source discharge pollution. Since runoff is not a pollutant, the ability to regulate ends at the pipe and does not extend to downstream impacts from excessive runoff.

### **CONCLUSION**

The VDOT decision appears to have closed the door on the EPA's use of nonpollutant surrogates in TMDLs, especially in light of the EPA's recent abandonment of similar efforts in Missouri prior to additional unfavorable rulings beyond Virginia. Without a state law in place, providing the legal basis for the use of a nonpollutant surrogate, future TMDLs' pollutant loads will be set based on actual pollutants. While it is not clear whether communities with surrogate-based TMDLs in place will question the validity of their TMDLs in response to this decision, it is unlikely the EPA would seek to litigate the issue should it be raised in the future. Rather, it seems the EPA will refocus its efforts on CWA programs such as the NPDES program that appears to have the authority to regulate flow. In this regard, it will be interesting to watch for litigation concerning the agency's attempts to regulate flow through Section 402 in the future.

Clearly the VDOT ruling does not appear to affect the EPA's upcoming updates to the Stormwater Regulations Revision to Address Discharges from Developed Sites, also known as the post-construction stormwater rule, which falls under Section 402 of the CWA. The EPA intends to propose a rule to strengthen the national stormwater program by June 10, 2013, and complete a final action by Dec. 10, 2014.

## NOTES

- <sup>1</sup> *Va. Dep't of Transp. v. EPA*, No. 12-775, 2013 WL 53741 (E.D. Va. Jan. 3, 2013).
- <sup>2</sup> *Id.*
- <sup>3</sup> *Chevron USA Inc. v. NRDC Inc.*, 468 U.S. 837 (1984).
- <sup>4</sup> VDOT at 3.
- <sup>5</sup> VDOT at 3.
- <sup>6</sup> *Id.* at 5.
- <sup>7</sup> Letter from Mr. Max H. Dodson to Mr. Art Compton, available at [http://www.google.com/url?sa=t&rct=j&q=yellowstone%20basi%20big%20creek%20tmdl&source=web&cd=1&ved=0CDAQFjAA&url=http%3A%2F%2Fwww.deq.mt.gov%2Fwqinfo%2FTMDL%2FBig%2520Creek%2520Yellowstone%2FApproval\\_BigCreekYelBasin.pdf&ei=DPSDUcTODZSI9ATXx4GYCA&usg=AFQjCNCkdwfWLiQCJmluM-fgPHh4JsKt3g](http://www.google.com/url?sa=t&rct=j&q=yellowstone%20basi%20big%20creek%20tmdl&source=web&cd=1&ved=0CDAQFjAA&url=http%3A%2F%2Fwww.deq.mt.gov%2Fwqinfo%2FTMDL%2FBig%2520Creek%2520Yellowstone%2FApproval_BigCreekYelBasin.pdf&ei=DPSDUcTODZSI9ATXx4GYCA&usg=AFQjCNCkdwfWLiQCJmluM-fgPHh4JsKt3g)
- <sup>8</sup> 7 Del. Admin. C. § 5000 & 5101.
- <sup>9</sup> *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).



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